Supreme Court, U.S.
FILED
JUN 15 1994
OFFICE OF THE CLERK

No. 93-1422

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

ROSEMARY WEISSICH; JILL ELAINE WEISSICH;
ELISE MARIE WEISSICH HUDSON; and
WILLIAM O. WEISSICH, JR.,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

ALVIN H. GOLDSTEIN, JR.
Counsel of Record
MARK L. MUSTO
ANDREW F. PIERCE
GOLDSTEIN & PHILLIPS
A Professional Corporation
One Embarcadero Center,
Eighth Floor
San Francisco, California 94111
Telephone: (415) 981-8855

Counsel for Petitioners

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

TABLE OF CONTENTS

Page

I.

THE WEISSICH'S CLAIM IS PROPER UNDER CALIFORNIA LAW 1

II.

THE NINTH CIRCUIT'S DECISION WAS NOT FACT-SPECIFIC 3

TABLE OF AUTHORITIES

Cases

	Page
Begay v. United States, 768 F.2d 1059 (9th Cir. 1985)	4
Berkovitz v. United States, 461 U.S. 531 (1988)	5
Dube v. Pittsburgh Corning, 870 F.2d 790 (1st Cir. 1989)	3
In Re Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982 (9th Cir. 1987)	4
Smith v. United States, 546 F.2d 872 (10th Cir. 1976)	3
Summers v. United States, 905 F.2d 1212 (9th Cir. 1990)	4, 5
Tarasoff v. Regents of the University of California, 17 Cal.3d 425, P.2d 334 (1976)	2
United States v. Gaubert, 499 U.S. 315 (1991)	5

No. 93-1422

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

ROSEMARY WEISSICH; JILL ELAINE WEISSICH;
ELISE MARIE WEISSICH HUDSON; and
WILLIAM O. WEISSICH, JR.,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

THE WEISSICH'S CLAIM IS PROPER UNDER CALIFORNIA LAW.

The Government devotes a considerable portion of its brief to an argument that under state law the ATF and U.S. Probation Service had no duty to warn. The Ninth Circuit did not reach this issue because it viewed its holding on the discretionary function issue to be jurisdictional. *See* Petitioners' Appendix at A-6. The Government's position on the state law issue is incorrect.

The Government argues that its agents did not have a duty to warn because there was no evidence that they learned of any conduct by Schlette after his arrest which suggested a danger to Weissich. Brief for the United States in Opposition at 8. This assertion is not supported by the record. The evidence establishing that agents of the USPS and ATF had specific knowledge that Schlette posed a danger to Weissich after his arrest is set forth in the Petition for Writ of Certiorari at 3-5.

Assuming, *arguendo*, that the federal agents learned nothing after the arrest, there would still be a duty to warn. In the leading case of *Tarasoff v. Regents of the University of California*, 17 Cal.3d 425, 551 P.2d 334 (1976) a psychiatrist learned that his patient intended to kill a third party. At the psychiatrist's request, campus police detained the patient but then released him. *Id.* 17 Cal.3d at 431. There is no indication in the *Tarasoff* opinion that the psychiatrist learned of any additional threats after the detention of the patient. The California Supreme Court found that the victim's parents could state a cause of action under California law based on the psychiatrist's duty to warn, despite the brief detention. *Id.* 17 Cal.3d at 450. Here federal officials learned of particular plans by Schlette for revenge against Weissich. These plans were the reason they arrested Schlette. *See* Petitioners' Appendix at A-15. It is conceded that Weissich did not learn of these particular plans. *Id.* Schlette was then briefly detained and released on probation. The record indicates that throughout his probation, officers of the ATF and the U.S. Probation Office understood that Schlette remained a danger to those he had previously threatened, including Weissich. ER 106, 155.

The *Tarasoff* court's holding that detention by campus police did not absolve the defendant of a duty to warn the victim is equally applicable here. Moreover, assuming hypothetically that the psychiatrist in *Tarasoff* learned that his

patient had been stalking the victim immediately prior to the commencement of therapy, the fact that the threatening behavior occurred prior to, rather than during, the period of the "special relationship" between defendant and perpetrator surely would not absolve the defendant of liability. The Government cites no authority holding that the distinction between knowing that a dangerous criminal wanted to kill someone yesterday and knowing he wants to kill him today is enough to eliminate a duty to warn.

To summarize, the United States is suggesting that this court deny certiorari on the basis of an issue that was never reached by the Ninth Circuit. This would be inappropriate. There is clearly a triable issue of fact on the duty issue under applicable principles of California law.

II.

THE NINTH CIRCUIT'S DECISION WAS NOT FACT-SPECIFIC.

The Government argues that the Ninth Circuit's decision is "fact-specific." *Id.* at 6, 13. Based on this assertion, the Government distinguishes the instant case from *Dube v. Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989) and *Smith v. United States*, 546 F.2d 872 (10th Cir. 1976) in which other circuits held that the discretionary function exception does not immunize the Government from liability for failure to warn of foreseeable dangers.

In fact, however, the Ninth Circuit's decision is not fact specific, primarily because the Government has no facts. As the Ninth Circuit acknowledges, the Government did *not* introduce evidence that it made a policy decision not to warn Weissich. In addition, the Government introduced no evidence of the potential cost or difficulty of providing a warning. The Ninth Circuit's opinion holds that such evi-

dence is *irrelevant* because of its conclusion that, as a matter of law,

> this choice [not to warn Weissich] implicated policy concerns. These concerns include how much of the agency's resources it should commit to identifying victims, what standard it should adopt to determine which potential victims to notify, and how it should go about notifying them. An analysis of these concerns would likely include consideration of budgetary constraints, as well as time and personnel limitations. . . . It is not necessary for the government to prove a conscious decision based on a policy analysis. . . .

See Petitioners' Appendix at A-7, A-8.

The Weissichs argue in their Petition for Certiorari that the Ninth Circuit's decision effectively eliminates affirmative duties to warn from the FTCA because the "policy concerns" set forth by the Ninth Circuit potentially apply in any situation in which a duty to warn might arise. Significantly, the Opposition Brief nowhere suggests how the language quoted above may be read more narrowly.

The Government also argues that in *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990) the Ninth Circuit held that the discretionary function exception did not bar federal liability for failure to warn. The Government's argument ignores the bulk of the Ninth Circuit's jurisprudence in this field, which holds that the discretionary function exception does bar liability for failure to warn. *See e.g.*, *Begay v. United States*, 768 F.2d 1059 (9th Cir. 1985) and *In Re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 998-999 (9th Cir. 1987).

The rationale of *Summers* was that there was no evidence that the Government weighed competing policy considerations. *Id.* at 1215. This approach was rejected by the above-quoted portion of the Ninth Circuit's opinion in this case,

which holds that the Government did not have to prove it made a decision based on policy analysis.

Indeed, the very contrast between the Ninth Circuit's analysis in *Summers*, which *was* fact-specific, and the Ninth Circuit's broad holding here that a duty to warn is discretionary because it *may* involve expense and other considerations, illustrates that the Ninth Circuit's interpretation of the discretionary function has become much broader. Petitioners submit that this error is based on a misreading of *Berkovitz v. United States*, 461 U.S. 531 (1988) and *United States v. Gaubert*, 499 U.S. 315 (1991). This court should grant the instant petition for certiorari in order to clarify the law in this area.

DATED: June 14, 1994

Respectfully submitted,

GOLDSTEIN & PHILLIPS
A Professional Corporation

By: ALVIN H. GOLDSTEIN, JR
Alvin H. Goldstein, Jr.

By: ANDREW F. PIERCE
Andrew F. Pierce

Counsel for Petitioners